BANGKOK BANK LTD.

v.

CHENG LIP KWONG

HIGH COURT, SINGAPORE
YONG PUNG HOW J
[SUIT NO. 5186 OF 1986]
15 FEBRUARY 1990

CIVIL PROCEDURE: *Order 18 r. 19 of the Rules of the Supreme Court 1970 - Defence struck out - Judgment for $1,250,000 - Judgment in excess - Application to amend judgment - Proof of the amended sum - Conclusive evidence clause in guarantee.*

The plaintiff bank on 17 April 1989 obtained an order from the Assistant Registrar that the defence of the defendant, who was being sued as a guarantor, to be struck out under O. 18 r. 19 of the Rules of the Supreme Court 1970. The plaintiffs entered judgment for $1,250,000 with interest.

But in entering judgment, the solicitors inadvertently failed to give credit to the defendant for $459,689.43 paid by the customer. Consequently, the plaintiffs obtained judgment on 17 April 1989 for a larger sum.

The plaintiffs applied to amend the judgment with the correct figure of $1,018,735.88.

The defendant had (2) objections:

(i) that as a general rule and except by way of appeal, no Court has power to amend or vary any judgment.

(ii) that the plaintiff has failed to prove the amended sum of $1,018,735.88.

Held:

[1] By virtue of O. 19 r. 9 of the Rules of the Supreme Court 1970, the Court has power to vary a judgment entered for more than the amount actually due at the time of judgment. The power is discretionary and terms may be imposed.

[2] The evidence to prove the liability of the defendant as a guarantor fell short of what was required by Clause 6(1) of the guarantee.

[Application dismissed with costs]

Cases referred to:
Thynee (Marchioness of Bath) v. Thynne (Marguess of Bath) [1955] 3 All ER 129
Evans v. Bartlam [1937] AC 480
Hughes v. Justin [1894] 1 QB 667
Muir v. Jenks [1913] 2 KB 412

Legislation referred to:
Rules of the Supreme Court 1970 [Sing], O. 14, O. 18 r. 19, O. 19 r. 9

For the plaintiffs/appellants - Sarjit Singh Gill; M/s. Shook Lin & Bok
For the defendant/respondent - J. Benny; M/s. Joseph Tan Jude Benny & Co.

JUDGMENT

Yong Pung How J:

In this summons-in-chambers the plaintiffs have applied for an order that they be at liberty to amend the judgment in default obtained by them on 17 April 1989 by substituting for the judgment debt of $1,250,000 the amended figure of $1,018,735.88; or, alternatively, that they be at liberty to set aside the judgment for $1,018,735.88.

In the somewhat tortuous proceedings in this action, the plaintiffs claimed against the defendant as a several guarantor of 25% of the liability of a corporate customer, the total liability of all the guarantors being limited to a maximum sum of $5,000,000. Proceedings before the Deputy Registrar under O. 14 resulted first in judgment being entered against the defendant on 3 July 1987 for $1,250,000, being his proportionate 25% share of the liability of the customer. On appeal to the Judge in Chambers, the defendant was granted unconditional leave to defend the action, and the Deputy Registrar's decision in entering judgment was set aside. After the defendant filed his defence, the plaintiffs applied for, and obtained on 17 April 1989, an order from the Assistant Registrar that the defence be stuck out under O. 18 r. 19 of the Rules of the Supreme Court 1970 and under the inherent jurisdiction of the Court; by the same order the plaintiffs were given liberty to enter judgment for the $1,250,000 and interest thereon.

The reason for the present application is given in the supporting affidavit filed by the plaintiffs' solicitors on 25 October 1989. It shows that on 1 August 1988 the plaintiffs in fact received a payment from their customer of $1,838,757.71 and credited the customer's account with them. The plaintiffs informed their solicitors of this payment, but, in entering judgment, the solicitors inadvertently failed to give credit to the defendant for $459,689.43, being his proportionate 25% share of the reduction in the customer's liability resulting from this payment. Consequently, the plaintiffs obtained judgment on 17 April 1989 for a larger sum than was properly due to them by the defendant.

In obtaining judgment, the plaintiffs had taken advantage of a conclusive evidence clause in the guarantee. Under this clause, an officer of the plaintiffs had certified that the amount due to the plaintiffs by the customer as at 16 August 1986 was $4,981,712.10. Together with accrued interest since then, the liability of the customer would have exceeded $5,000,000. Accordingly, the judgment entered against the defendant reflected his full liability for 25% of this sum or $1,250,000.

The supporting affidavit filed by the plaintiffs' solicitors on 25 October 1989 therefore exhibited what purported to be a statement of the defendant's liability as a guarantor, signed by an officer of the plaintiffs. It opened with a statement of the defendant's 25% liability of $1,250,000 on 2 October 1986; gave credit for $459,689.43 on 1 August 1988, and debited the accrued interest (of $183,561.65 for the period from 2 October 1986 to 1 August 1988, and $44,863.66 for the period from 2 August 1988 to 17 April 1989) to arrive at a corrected liability of the defendant of $1,018,735.88 as at 17 April 1989.

In this action, the defence was struck out and judgment was entered in default of pleadings. Plaintiffs' Counsel has therefore relied on the power conferred on the Court by O. 19 which deals with the cases of default of pleadings, and r. 9 of which specifically provides as follows:

> 9. The Court may, on such terms as it thinks fit, set aside or vary any judgment entered in pursuance of this order.

This proposition is further clarified by the comment under O. 19 r. 9 in *The Supreme Court Practice 1988* which includes the statement:

> Where an order is made that a defence be struck out and judgment be entered accordingly, the judgment so entered is a judgment in default of defence and like any other such judgment can be set aside or varied under this rule (*Bains v. Patel,* the Times, 20 May 1983, CA).

Defendant's Counsel has opposed this application on 2 grounds. He has argued that, as a general rule, and except by way of an appeal, no Court has power to amend or vary any judgment after it has been entered, whether an application be made in the original action or a fresh action be brought to review the judgment: 26 *Halsbury* para. 556. Exceptions to this general rule may be regulated by rules of Court: thus O. 20 r. 11 provides as follows:

> Order 20 r. 11. Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court by summons without an appeal.

The Court's inherent jurisdiction to vary an order is also limited to clarification and correction in cases where an order, whether passed and entered or not, does not express the order actually made; but this inherent jurisdiction does not extend to cases in which a Court has come to an erroneous decision either in regard to law or to fact, as in the present case: *Thynne (Marchioness of Bath) v. Thynne (Marguess of Bath)* [1955] 3 All ER 129 at 145, 146 CA and cases cited therein.

In my opinion, O. 20 is really concerned with the subject of amendments of pleadings generally, and r. 11 is intended to obviate some of the rigidity of r. 8(2) by virtue of which the Court has no power to amend or correct any defect or error in any judgment or order. It does not preclude or restrict the exercise of the specific power conferred on the Court by O. 19 r. 9 to vary a judgment entered in default of defence. There are other similar rules conferring specific powers on the Court to set aside or vary a default judgment or order, e.g., to set aside a default judgment under O. 14 r. 11; to set aside judgment in default of discovery or inspection of documents under O. 24 r. 17; to set aside judgment in default of answering interrogatories under O. 26 r. 9; and to set aside default judgment at trial under O. 35 r. 2. In *Evans v. Bartlam* [1937] AC 480, Lord Atkin explained:

> The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

A judgment in default of defence for more than the amount actually due at the time judgment is entered is obviously bad, but can be amended under O. 19 r. 9. The Court's exercise of its power in such cases is not confined to correcting errors which have arisen from clerical slips or mistakes, but the exercise of the power is discretionary and may be subject to such terms as may be imposed: *Hughes v. Justin* [1984] 1 QB 677; *Muir v. Jenks* [1913] 2 KB 412 CA.

Of more relevance and weight, however, is the defendant's other argument that, even if the Court has jurisdiction, the plaintiff must prove the amended figure of $1,018,735.88 and has failed to do so. In this action the plaintiffs have taken advantage of the convenience afforded to them by the existence of the conclusive evidence Clause 6(c) in the guarantee. This Clause 6(c) is focussed on the liabilities of the customer and reads as follows:

6(c). Any admission or acknowledgement in writing by the customer or any person on behalf of the customer of the amount of the indebtedness of the customer or otherwise in relation to the subject matter of this guarantee or any judgment or award to the bank against the customer or proof by the bank in bankruptcy or companies winding up which is admitted or any certificate by an officer of the bank as to the moneys and liabilities for the time being due and remaining or incurred to the bank from or by the customer or a copy of the account of the customer contained in the bank's book of account signed by any officer of the bank shall be binding and conclusive evidence on the guarantor in all Courts of law and elsewhere.

Plaintiffs' solicitors have filed an affidavit on 25 October 1989 in support of the present application. As a starting point, para. 3 of this affidavit refers to an earlier affidavit filed on 28 March 1989, and states that the certificate issued under the conclusive evidence clause, and exhibited to the earlier affidavit, correctly reflected the amount of $4,981,712.10 due to the plaintiffs by their customer as at 16 August 1986. There is then exhibited to the affidavit of 25 October 1989 the following 2 page computation marked "A", in which the opening entry however is not 16 August 1986 but 2 October 1986, and which concerns the liability of the defendant and not the liability of the customer, which would be required of any certificate, if the benefit of the conclusive evidence Clause 6(c) is invoked:

Bangkok Bank Ltd.

Name: Mr. Cheng Lip Kwong Currency: Singapore Dollars

Date	Particulars	Debit	Credit	Principal
2 October 1986	Debt			1,250,000
31 December 1986	Interest @ 8% on $1,250,000 from 2 October 1986 to 31 December 1986 (91 days)	24,931.51		
31 December 1987	Interest @ 8% on $1,250,000 from 1 January 1987 to 31 December 1987 (365 days)	100,000.00		
1 August 1988	Interest @ 8% on $1,250,000 from 1 January 1988 to 1 August 1988 (214 days)	58,630.14		
	(Total accrued interest from 2 October 1986 to 1 August 1988 is $183,561.65)			

Sgd:
Kamriang Timaphorn
Vice President
Branch Manager

AL/sh
NB - Last date of TOL payment was 1 August 1988.

Name : Mr. Cheng Lip Kwong Currency: Singapore Dollars

Date	Particulars	Debit	Credit	Principal
1 August 1988	TOL payment received: $1,838,757.71		459,689.43 (25% of $1,838,757.71)	790,310.57
	Interest at 8% on $790,310.57 from 2 August 1988 to 17 August 1989 (259 days)	$44,863.66		
	(Total accrued interest from 2 August 1988 to 17 April 1989 is $44,863.66)			

Total liability as at 17 April 1989:

Balance Principal	:	$ 790,310.57
Add Interest from 2 October 1986 to 1 August 1988 on $1.25m	:	$ 183,561.65
Add Interest from 2 August 1986 to 17 April 1989 on $790,310.57	:	$ 44,863.66
		$1,018,735.88

Sgd:
Kamriang Timaphorn
Vice President
Branch Manager

In the circumstances of this action, the exhibit can only have been intended to be used as proof under the conclusive evidence Clause 6(c) of the amount due to the plaintiffs by the defendant as at 17 April 1989. But, the liability of the defendant as a several guarantor is dependent on the liability of the customer, which needs to be proved first. For this purpose, the plaintiff can take advantage of the benefit afforded by the conclusive evidence Clause 6(c), but the form of proof must fall squarely within the ambit of the clause. In view of the wording of the clause, it must be in fact a certificate of the liability of the customer as at 17 April 1989, from which the liability of the defendant as a several guarantor of 25% of the customer's liability can be calculated with accuracy, or fixed at the maximum of $1,250,000 as a logical inference when the customer's liability exceeds $5,000,000. The exhibit marked "A" falls short of what is required to prove the amended amount due by the defendant. The application must be dismissed, with costs.

Also found at [1990] 1 CLJ 1017